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IN THE
COURT OF APPEALS OF INDIANA

DANIEL K. KELLY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0507-CR-377
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Paula Lopossa, Judge
Cause No. 49G01-9211-CF-152969

September 8, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Daniel K. Kelly appeals the sentence imposed after he pleaded guilty to thirteen offenses: two counts of child molesting as class B felonies, nine counts of child molesting as class C felonies, and two counts of child exploitation as class D felonies; and the State presses a cross-appeal on the issue of whether the trial court erroneously allowed Kelly's belated appeal.

We affirm.

ISSUES

1. Whether the trial court erred when it allowed Kelly's belated appeal.

2. Whether the enhanced sentences imposed for each of the respective felony offenses violate Kelly's Sixth Amendment right to have aggravating factors determined by a jury.

FACTS

On November 21, 1992, in an amended information, the State charged Kelly with nineteen offenses: five counts of child molesting as class B felonies, twelve counts of child molesting as class C felonies, and two counts of child exploitation as class D felonies. The offenses were alleged to have occurred on various occasions between December 1, 1987 and October 31, 1992. The alleged victims were his stepdaughter, D. (born 3/22/83), and his two biological daughters, T. and K. (born 3/24/84 and 3/20/85).

On January 21, 1994, pursuant to a plea agreement, Kelly offered to plead guilty to thirteen offenses: two counts of child molesting as class B felonies, nine counts of child molesting as class C felonies, and two counts of child exploitation as class D felonies; the remaining six counts would be dismissed, and sentencing would be

determined by the trial court. At the guilty plea hearing on January 21, 1994, the trial court asked the State to detail the evidence that the State would adduce if it proceeded to trial. The deputy prosecutor proceeded to read the lengthy affidavit for probable cause[1] prepared by a detective at the Indianapolis Police Department.[2] When asked by the trial court if these facts were true, Kelly answered "No"; asked by the trial court, "What is not true about what she just said," he answered, "Sexual intercourse" and added, "I did not force myself upon the children. I did not make them do anything they did not want to do." (Tr. 31). The trial court noted that his denials did not "go to the essential elements of any of the crimes" to which he was pleading guilty, and Kelly's counsel agreed, stating that "the intercourse . . . counts" were being dismissed by the State and that "there's no element of force" in the crimes to which he was pleading guilty. (Tr. 31). The trial court ordered a pre-sentence investigation report (PSI).

At the hearing on April 15, 1994, the trial court informed Kelly that it had received the PSI, as well as "[Kelly's] sentencing report," (Tr. 41), and then advised him that it was accepting his pleas of guilty and entered judgment of conviction on the thirteen counts. Without objection, "the journal and photographs belonging to [Kelly]" -- which were referenced in the probable cause affidavit and discussed at the plea hearing -- were admitted into evidence. (Tr. 47). The trial court stated that it "had read the journal" and had "looked at the photographs." (Tr. 50, 51). Kelly submitted a letter he had

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[1] The affidavit itself is not included in Kelly's record on appeal; the reading of the affidavit takes ten pages in the transcript. (Tr. 21-31).

[2] According to the reading of the affidavit, it contained numerous references to the contents of a journal written by Kelly and to an album of photographs of Kelly and his victims.

written to the trial court and a letter that he had written "to the children," and asked that they "become part of the Presentence." (Tr. 79). The trial court sentenced Kelly to serve twenty years for each of the class B felony child molesting offenses; eight years on eight counts of class C felony child molesting offenses and three years for the ninth count of class C felony child molesting; and three years for each of the class D child exploitation offenses. It imposed consecutive sentences so as to order a total executed term of seventy-two years; Kelly does not object as to the total sentence.

On June 9, 2005, Kelly filed a *pro se* belated notice of appeal, asserting that "he was never informed by the Trial Court that he could appeal the sentencing" and that he sought to challenge his sentence. (Tr. 255). On June 21, 2005, counsel for Kelly filed a motion to file a belated notice of appeal, which motion was granted by the trial court.

DECISION

1. Belated Appeal

We first address the State's cross-appeal. The State argues that the trial court abused its discretion when it granted Kelly's motion to file a belated notice of appeal. We cannot agree.

In Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004), our Supreme Court held that "a person is entitled to contest on direct appeal the merits of a trial court's sentencing decision where the trial court has exercised sentencing discretion, *i.e.*, where the sentence is not fixed by the plea agreement." If that person's "time for filing a direct appeal has run," he may challenge the sentence by filing "an appeal under P-C.R. 2" -- a "petition for permission to file a belated notice of appeal." Id. at 232.

Post-Conviction Rule 2 allows a petition for permission to file a belated notice of appeal where the failure to file a timely notice of appeal was not due to the fault of the defendant, and the defendant has been diligent in requesting permission to file a belated notice of appeal under the rule. Where, as here, the trial court holds no hearing on a P-C.R. 2 motion, we review *de novo* whether the motion satisfies the requirements of the rule. Baysinger v. State, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005).

Kelly's *pro se* motion to file a belated notice of appeal asserted that he had not been advised of his right to appeal his sentence. Further, the transcripts of his guilty plea hearing and his sentencing hearing confirm that Kelly was not advised of his right to appeal his sentence. Moreover, as in Hull v. State, No. 49A02-0504-CR-298, 2005 WL 3556706 at *2 (Ind. Ct. App. December 30, 2005), "the State does not dispute that the trial court failed to inform [Kelly] . . . of his right to appeal his sentence." As to his diligence, Kelly's motion was filed within seven months of Collins.[3] We conclude that the trial court did not abuse its discretion in granting Kelly's motion. See Hull at *3.

2. Sentence

Kelly asserts that when the trial court imposed the enhanced sentences based upon its finding of aggravating circumstances, he was denied his Sixth Amendment right to have a jury determine any facts used to aggravate his sentence, citing Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). We are not persuaded.

[3] Collins was issued November 9, 2004; his motion was filed June 9, 2005.

The State reminds us that two panels of this court have recently declined to apply Blakely in the case of appellants pursuing belated appeals under Post-Conviction Rule 2. See Hull 2005 WL 3556706, and Robbins v. State, No. 03A04-0504-PC-192, 2005 WL 3536284. However, in Sullivan v. State, 836 N.E.2d 1031, 1035 (Ind. Ct. App. 2005), a third panel of this court found that consistent with Fosha v. State, 747 N.E.2d 549, 552 (Ind. 2001), an appellant granted permission to file a belated appeal to pursue a challenge to his sentence *could* "rely on Blakely even though he was sentenced more than five years before it was decided." Inasmuch as no transfer was sought in any of these cases, and both lines of reasoning are well-supported, we choose to address Kelly's Blakely argument on the merits.

Blakely reiterated the Sixth Amendment rule announced in Apprendi: "[O]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." 124 S. Ct. at 2536. In Smylie v. State, 823 N.E.2d 679, 674-85 (Ind. 2005), our Supreme Court held that Blakely applies to Indiana's sentencing scheme. Hence, under Indiana's scheme, a sentence may be enhanced

> based only on those facts that are established . . . 1) as a fact of prior conviction; 2) by a jury beyond a reasonable doubt; 3) when admitted by a defendant; and 4) in the course of a guilty plea when the defendant has waived Apprendi rights and stipulated to certain facts or consented to judicial fact finding.

Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005) (citing Blakely and United States v. Booker, 125 S. Ct. 738, 756 (2005)). Further, the fact that a defendant was on probation at the time of the offense for which he is being sentenced is an aggravator that need not

be proven before a jury. Ryle v. State, No. 49S02-0505-CR-207, WL 3378469 (Ind. December 13, 2005).

Here, the trial court stated that it found as a mitigating factor that Kelly had "observed his own father having intercourse with a female child." (Tr. 87). It then found as

> aggravating factors that the nature of this crime is such that anything less would depreciate the seriousness of it. The Defendant maintained a notebook showing that he intended to continue the molestations. That he committed these molestations on three separate female children. That he photographed them during the molestations. That he simulated intercourse in the presence of one of the children, with another child. That he threatened two of the victims by saying that their grandmother would go to the hospital and they would never see her again. And he showed these young children "x" rated movies. These children were in a position of trust with Mr. Kelly. Further, the Court finds that Mr. Kelly minimizes his involvement in these acts and their impact on his victims.

(Tr. 88).

The State suggests that Kelly essentially admitted most of the facts found by the trial court when he only expressed his disagreement with the reading of the probable cause affidavit as to the facts of (1) intercourse and (2) force. However, the trial court failed to ask a follow-up question and confirm that Kelly was admitting the truth of all the other facts – including the specifics of what D., T., and K. had reported to the officer and the contents of the notebook and photograph album – as stated in the affidavit read by the prosecutor. Therefore, we cannot find that these facts were clearly admitted by Kelly based on that colloquy at the plea hearing.

At the plea hearing, the State referred to Kelly's notebook journal and photograph album. At the sentencing hearing, both were admitted into evidence without objection.

However, the trial court's transcript prepared for appeal reflects that the trial court has been unable to locate the journal and album. Hence, it is not available for our review.

Therefore, we turn to the question of whether the record before us contains facts which do not have to be submitted to a jury in order to be used to impose an enhanced sentence without violating Blakely and its progeny. Kelly admitted to the trial court that he had a felony conviction. In fact, the PSI reflects that he had a criminal history consisting of one felony and four misdemeanor convictions, all involving drugs and/or alcohol. Kelly's letter to the trial court linked his use of "alcohol and drugs" to his instant offenses. (App. 95). Kelly also admitted to the trial court that he was on probation at the time of at least one of the current offenses, which fact is confirmed in the PSI. Further, in his own sentencing report, his witness reported that Kelly "knows that he has committed serious offenses against his daughters"; in his letter to the trial court, Kelly refers to "the loss of my Father, Daughter relationship," naming D., T., and K.; and in his letter to D., T., and K., Kelly refers to what he had "done to the Father, Daughter relationship" and having "hurt you children," his "Daughters." (App. 83, 93, 98, 99, 101). These statements are an admission by Kelly that he held a position of trust with his victims. Finally, by pleading guilty to child molesting offenses occurring over a period of nearly five years with victims ranging from age four to age eight, Kelly admitted engaging in a continuing pattern of anti-social, criminal behavior over a lengthy period of time.

Kelly's criminal history and the fact that he was on probation are aggravating factors. Further, Kelly admitted to a pattern of behavior over a period of years of

molesting his own daughters and his stepdaughter, children in the tender years of their childhood and with whom he stood in a position of trust. Recognizing that the timing of this belated appeal presents a challenge in that the trial court's sentencing of Kelly is not easily amenable to analysis under the rubric of Blakely, we nevertheless find that the facts established in the record do sustain the enhanced sentences ordered by the trial court.[4]

Affirmed.

RILEY, J., and VAIDIK, J., concur.

[4] The trial court's authority to order consecutive sentences was not affected by Blakely. Estes v. State, 827 N.E.2d 27, 29 (Ind. 2005) (citing Smylie v. State, 823 N.E.2d 679, 686 (Ind. 2005)).